No. 96-1577

In The

Supreme Court of the United States

October Term, 1997

STATE OF ALASKA,

Petitioner,

v.

NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE NAVAJO NATION, THE PUEBLO OF LAGUNA, THE SANTA ANA PUEBLO, THE SHOSHONE TRIBE OF THE WIND RIVER RESERVATION, THE LUMMI NATION, THE ROSEBUD SIOUX TRIBE, THE CROW TRIBE OF INDIANS, AND THE UTE INDIAN TRIBE AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*[1]

The Navajo Nation is a federally-recognized Indian nation with 225,000 citizens and a territory of over 17 million acres. About 2.8 million acres of Navajo Indian country is located in the Bureau of Indian Affairs' Eastern Navajo Agency, outside of the Navajo reservation proper, and includes the three Navajo "satellite reservations" of Ramah, Canoncito and Alamo (or Puertocito). The Navajo Nation is joined in this brief by eight other federally-recognized tribes. These tribes occupy and govern established Indian country throughout the United States.

The Pueblo of Laguna and the Santa Ana Pueblo are two of the New Mexico Pueblo tribes characterized as "dependent Indian communities" in *United States v. Sandoval*, 231 U.S. 28 (1913). Alaska's position that a federal set aside of land is a prerequisite for finding a dependent Indian community, if adopted by the Court, would reverse *Sandoval* and destroy the Indian country status of Pueblo lands. These *amici* seek to preserve the Indian country status of their lands, over which these *amici* have continuously exercised governmental authority for more than 500 years.

Indian country, as defined in 18 U.S.C. § 1151, includes formal and informal reservations, dependent

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amici* and their counsel made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been filed with the Clerk.

Indian communities, and trust or restricted allotments. The first reported decision construing the phrase "dependent Indian community" in 18 U.S.C. § 1151(b) concerned the Ramah Navajo community. *United States v. Martine*, 442 F.2d 1022 (10th Cir. 1971). The Ramah Navajos occupy an area of 168,000 acres in a " 'checkerboard' area . . . [where] some of the land was owned by the Navajo Tribe and some was not." James E. Lobsenz, *"Dependent Indian Communities": A Search For a Twentieth Century Definition*, 24 Ariz. L. Rev. 1, 21 (1982). Despite the non-Indian ownership of some of the land there, Ramah was held to be Indian country in *Martine*. Later, in holding that certain state taxes could not lawfully be imposed on contractors building a school for the Ramah children that New Mexico had "abandoned," this Court referred to the Ramah area as the "reservation." *Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832, 834 & n.1 (1982).

"Over time the Interior Department and the [Navajo] Tribe have tried to consolidate as much land as possible in Navajo ownership" in the checkerboard area included in the Bureau of Indian Affairs' Eastern Navajo Agency. *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1419 (10th Cir.), *cert. denied*, 498 U.S. 1012 (1990), *opinion after remand*, 52 F.3d 1531 (10th Cir. 1995). The Navajo Nation and federal government provide virtually all government services there. *Id.* at 1436 (reproducing *Pittsburg & Midway Coal Mining Co. v. Saunders*, No. CIV 86-1442-M (D.N.M. Aug. 22, 1988)); *see Thriftway Mktg. Corp. v. New Mexico*, 810 P.2d 349, 352 (N.M. Ct. App. 1990) (off-reservation Nageezi Chapter of the Navajo Nation "performs similar functions with respect to the health and welfare of its residents as those performed by

a county or municipality in the state government system."). About 90% of the people there are Navajo Indians and the vast majority of land there is owned by the Navajo Nation or otherwise withdrawn for exclusive Navajo use by the United States. *Id.*

Nonetheless, Navajo and federal authority in the area is sporadically opposed by those seeking to avoid criminal prosecution, environmental regulation or Navajo taxation, often in cases where part of a transaction can be said to occur on non-Indian land in the area. *E.g., HRI, Inc. v. United States Environmental Protection Agency*, No. 97-9556 (10th Cir. filed Aug. 27, 1997). Navajo and/or federal authority has typically been vindicated in these cases.[2]

The case now before the Court requires principally an examination of congressional intent in legislation unique to Alaska. *See* Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. § 1601 *et seq.* However, Alaska and the states supporting it here apparently view this case as a vehicle to upset decades of settled law of the

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[2] *See, e.g., United States v. Martine*, 442 F.2d 1022 (10th Cir. 1971) (upholding federal criminal jurisdiction under 18 U.S.C. § 1151(b) over crime committed in Ramah Chapter); *Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531 (10th Cir. 1995) (requiring exhaustion of tribal remedies in challenge to Navajo taxes on coal mine located in Tsayatoh Chapter); *United States v. Calladitto*, No. CR 91-356-SC, 19 Ind. L. Rep. 3057 (D.N.M. 1991) (upholding federal criminal jurisdiction under 18 U.S.C. § 1151(b) for crime committed on Navajo fee land in off-reservation Baca Chapter); *Valencia Energy Co.*, 109 IBLA 40 (1989) (Navajo tribal fee lands in Eastern Navajo Agency are "Indian lands" under 1977 surface mining act), *aff'd*, No. CIV 89-758-M (D.N.M. 1994).

federal courts of appeal concerning 18 U.S.C. § 1151(b), whose construction of that provision is remarkably consistent, principled, and faithful to this Court's precedents.

The Navajo Nation and the tribes joining it here file this brief to protect their authority, and that of their trustee, the United States, in off-reservation Indian country.

SUMMARY OF ARGUMENT

This Court first recognized dependent Indian communities as a category of Indian country in a case where a community of self-governing tribal Indians having a special relationship with the United States occupied a territory that had *not* been set aside for their use by Congress. *United States v. Sandoval*, 231 U.S. 28 (1913). Congress later codified that and other decisions in 18 U.S.C. § 1151. *See United States v. John*, 437 U.S. 634, 648 (1978).

In § 1151, "Congress . . . defined Indian country broadly to include formal and informal reservations, dependent Indian communities and Indian allotments." *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 123 (1993). Land set aside for Indian use by Congress is Indian country under 18 U.S.C. § 1151(a) as formal or informal reservation land. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991); *John*, 437 U.S. at 648-59 (citing *United States v. McGowan*, 302 U.S 535, 537 (1938)).

In contrast, land traditionally occupied and governed by tribal Indians in a community enjoying a special relationship with the United States but not necessarily having a federal set-aside of land is "Indian country" under a *different* subsection of 18 U.S.C. § 1151. That land is the territory of a "dependent Indian community" under 18 U.S.C. § 1151(b). *See John*, 437 U.S. at 648 & n.17.

Employing the analysis of *Sandoval*, the lower federal courts of appeal have developed a remarkably consistent and principled body of law construing 18 U.S.C. § 1151(b). These courts recognize that, although a federal dedication of land in an Indian community may provide evidence of the Indian country status of its territory, federal ownership of land is not the *sine qua non* of Indian country under 18 U.S.C. § 1151(b). If it were (as Alaska and its *amici* urge), § 1151(b) would be rendered superfluous, and such a construction of § 1151 would violate several fundamental rules of statutory construction.

The quarter century of decision making by federal courts applying virtually identical tests could not have escaped the notice of Congress. Congress has repeatedly employed the phrase "dependent Indian community" in recent statutes, with no suggestion of dissatisfaction with the consistent judicial interpretation of that term. The Court therefore should not disturb this mature body of case law, but rather respect congressional prerogative, embrace the collective wisdom of the lower courts, and endorse the test they have developed.

ARGUMENT

I. REQUIRING AN EXPRESS CONGRESSIONAL SET ASIDE OF LAND FOR INDIAN COUNTRY STATUS UNDER 18 U.S.C. § 1151(b) CONTRAVENES THIS COURT'S PRECEDENTS, CONGRESSIONAL INTENT, AND FUNDAMENTAL RULES OF STATUTORY CONSTRUCTION.

The question in this case is whether Venetie land is "Indian country" under 18 U.S.C. § 1151. "Indian country" is defined as:

> (a) all land within the limits of any Indian reservation, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Id. As discussed below, the view of Alaska and its *amici* that dependent Indian community status requires an express congressional set aside of land contravenes the intended and established meaning of § 1151(b).

A. Lands Set Aside by Congress for Indian Use Are "Reservations" Under 18 U.S.C. § 1151(a).

The definition of Indian country in 18 U.S.C. § 1151 is "based on several decisions of this Court interpreting the term as it was used in various criminal statutes relating to Indians." *John*, 437 U.S. at 648. One of those cases is

United States v. McGowan, 302 U.S. 535 (1938). *McGowan* held that an area where Indians live constitutes Indian country if it has been "validly set apart for the use of the Indians as such, under the superintendence of the government" regardless of the name Congress attaches to the area. *Id.* at 538-39 (citation and emphasis omitted) (finding "Reno Indian Colony" to be Indian country). The land set aside for the Reno Indian Colony was not held in "trust" status. *See id.* at 537.

Some Indian reservations are established formally as "reservations" by treaty, act of Congress or Executive Order. *McGowan* spawned the modern cases holding that lands acquired or set aside by Congress for Indian tribes without a "reservation" label are "informal reservations" that constitute Indian country under 18 U.S.C. § 1151(a). *John*, 437 U.S. at 648-49 & n.17; *Potawatomi*, 498 U.S. at 511. In *John*, the Court noted that "three categories of land" comprise Indian country, and that the first category, reservation land, was that "with which we are here concerned." *John*, 437 U.S. at 648. Relying on *McGowan*, the unanimous Court held as follows:

> The Mississippi lands in question here were declared by Congress to be held in trust by the Federal Government for the benefit of the Mississippi Choctaw Indians who were at that time under federal supervision. There is no apparent reason why these lands, which had been purchased in previous years for the aid of these Indians, did not become a "reservation," at least for the purposes of federal criminal jurisdiction at that particular time.

Id. at 649.

Similarly, the tribe in *Potawatomi* occupied land that was not "formally designated 'reservation.' " 498 U.S. at 511. The land was, however, owned by the United States and held in trust for the Potawatomi. *Id.* Relying on *McGowan* and *John*, the unanimous Court found "that this trust land is 'validly set apart' and thus qualifies as a reservation for tribal immunity purposes." *Id.*

Finally, in *Sac and Fox* the Court considered the validity of certain state taxes imposed on Indians within their tribal territory. Justice O'Connor, writing for yet another unanimous Court, observed that "*Congress has defined Indian country broadly to include formal and informal reservations*, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States. See 18 U.S.C. § 1151." 508 U.S. at 123 (emphasis added).

Thus, 18 U.S.C. § 1151(a) encompasses both formal reservations, *see Donnelly v. United States*, 228 U.S. 243 (1913) (Executive Order Indian reservation), and lands set apart by the Government for Indians without a formal "reservation" designation, *John; Potawatomi*. "Dependent Indian communities" are different. That term is derived from *Sandoval*, and their territory is treated in § 1151(b).

B. Under *Sandoval* and 18 U.S.C. § 1151(b), Land Title Is Only One Factor Considered in Determining Dependent Indian Community Status.

The Pueblo Indians in New Mexico occupy the prototypical dependent Indian communities. *Sandoval* decided the validity of a federal statute prohibiting the introduction of liquor into Pueblo lands held in fee simple communally. Although *United States v. Joseph*, 94 U.S. 614

(1877), had held that people of the Taos Pueblo did not constitute an "Indian tribe" under an 1851 act of Congress, the subsequent enabling act for New Mexico prohibited the "sale . . . and the introduction of liquors into Indian country, which term shall *also* include all lands now owned or occupied by the Pueblo Indians of New Mexico." *Sandoval*, 231 U.S. at 37 n. † (emphasis in original, but deleted as to remainder of quotation). *Sandoval*'s holding was not based on the congressional designation of Pueblo lands as Indian country, as Alaska urges. Pet. Br. 20-21. The question in *Sandoval* was not whether Congress had made Pueblo lands Indian country, but whether Congress had the *power* to extend federal liquor prohibitions to those lands. *Sandoval*, 231 U.S. at 38. To answer that question, *Sandoval* focused on the Pueblo communities and their political relationship with the United States, not land status, to determine whether Congress had the constitutional authority to assert federal control there:

> The question to be considered, then, is whether the status of the Pueblo Indians and their lands is such that Congress competently can prohibit the introduction of intoxicating liquor into those lands notwithstanding the admission of New Mexico to statehood.

Id.

In reaching its decision, the Court examined several factors. First, it noted that the Pueblo lands were "held in communal, fee simple ownership under grants from the King of Spain . . . and confirmed by Congress since the acquisition of that territory by the United States." *Id.* at 39. Second, the Court looked at evidence of a cohesive Indian community and the relationship of the Pueblo

Indians to their tribal government, observing that they are "Indians in race, custom and domestic government . . . living in separate and isolated communities . . . and chiefly governed according to the crude customs inherited from their ancestors." *Id.* Third, the Court found that the Pueblo people had "been regarded and treated by the United States as requiring special consideration and protection, like other Indian communities." *Id.* In this respect, the Court observed that federal monies were used to provide them with farming implements, to provide Indian "agents and superintendents to guard their interests," to construct and operate training and day schools at the Pueblos, to construct dams and irrigation works, to reserve public lands for their use in the surrounding area where their own lands were deemed inadequate, and to provide a special attorney to safeguard their rights to be free from state taxes. *Id.* 'at 39-40.

Considering these various factors, the Court upheld federal power to prohibit liquor traffic on Pueblo land. *Id.* at 47. The fact that the Pueblo held its land in communal fee simple under Spanish land grants did not concern the unanimous Court.

> It is true that the Indians of each pueblo do have [a fee simple] title . . . but it is a communal title, no individual owning any separate tract. In other words, the lands are public lands of the pueblo, and so the situation is essentially the same as it was with the Five Civilized Tribes, whose lands, although owned in fee under patents from the United States, were adjudged subject to the legislation of Congress enacted in the exercise of the government's guardianship over those tribes and their affairs.

Id. at 48. *See also United States v. Chavez*, 290 U.S. 357, 363-65 (1933) (holding that the Pueblo of Isleta is Indian country because that term "was intended to include any unceded lands owned or occupied by an Indian nation" although the boundaries of that territory may be " 'sometimes ill-defined.' ") (citation omitted). Neither a federal set aside nor federal ownership of land was a component of *Sandoval*'s functional analysis.

However, the Court cautioned that Congress could not "bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe, but only that in respect of distinctly Indian communities." *Sandoval*, 231 U.S. at 46. Ultimately, the Court determined that the Constitution's delegation of authority to Congress to regulate commerce with the Indian tribes gave rise to a correlative federal duty to foster and protect "all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and within or without the limits of a state." *Id.* at 45-46.

Notably, Congress codified this exact language of *Sandoval* in § 1151(b). *Compare id.* at 46 *with* 18 U.S.C. § 1151(b). Both the use of that language in § 1151(b) and the legislative history for all of § 1151 make it absolutely clear that Congress intended to codify *Sandoval*, and *Sandoval* alone, in § 1151(b).[3] *Sandoval*'s dependent Indian community analysis applies to § 1151(b). Petitioner's and State *amici*'s efforts to read *McGowan*'s "set apart" and federal ownership requirements into § 1151(b) reveal a

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[3] See H.R. Rep. No. 304, at A92 (1947), *reprinted in* 18 U.S.C.A. § 1151, Reviser's Note, 1948 Act (West 1984), discussed in more detail *infra* part I.C.

basic misreading of this Court's precedents and a misunderstanding of the structure of § 1151 as a whole.

C. Adding an Inflexible Federal Land Set-Aside Requirement to § 1151(b) Would Violate the Intent of Congress.

Congress defined Indian country in a statute. 18 U.S.C. § 1151. This Court's responsibility is to construe that statute, and to do so the Court must determine Congress' intent. *Dole v. United Steelworkers of America*, 494 U.S. 26, 35 (1990). The statute should be read as a whole, because "the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent Hospital*, 502 U.S. 215, 221 (1991). Here, Congress' intent is abundantly clear.

Congress adopted *verbatim* the language of *Sandoval* in § 1151(b). Congress based §§ 1151(a) and (c) on *McGowan* and *United States v. Pelican*, 232 U.S. 442 (1914), respectively.[4] H.R. Rep. No. 304, 80th Cong., 1st Sess., at A92 (1947), *reprinted in* 18 U.S.C.A. § 1151, Reviser's Note, 1948 Act (West 1984); *see generally John*, 437 U.S. at 648. Judicial imposition of a federal land set-aside requirement under § 1151(b) would necessarily be inconsistent with the intent of Congress. The 1948 codification of the criminal code "contemplates, implies, and produces continuity of existing law in clarified form rather than its interruption." *United States v. Grainger*, 346 U.S. 235, 248

[4] This case does not concern the status of allotments under § 1151(c). *State of Alaska v. Native Village of Venetie*, 856 F.2d 1384, 1390 (9th Cir. 1988).

(1953). *Sandoval*, the first true dependent Indian community case and the one Congress expressly sought to codify, required no such federal set aside of land, and, indeed, recognized that the United States had *not* set aside land for fourteen of the twenty New Mexico Pueblo tribes. *Sandoval*, 231 U.S. at 39.

The most fundamental rules of statutory construction would be violated by judicial imposition of a rigid federal land set aside or federal ownership requirement into § 1151(b). First, the starting point for construing an act of Congress is the language of the act itself. *Dole*, 494 U.S. at 35; *United States v. Hohri*, 482 U.S. 64, 69 (1987). Nowhere in 18 U.S.C. § 1151(b) is there even a suggestion that land status is dispositive, although land status clearly *is* dispositive in the surrounding subsections of § 1151. *See* 18 U.S.C. § 1151; *Field v. Mans*, 116 S.Ct. 437, 446 (1995) (the "negative pregnant" argument is strongest when contrasting statutory sections are enacted simultaneously and when it suggests a result consistent with the use of common law language in the statute). Rather, the phrase "dependent Indian community" simply contemplates a community of Indians dependent on federal protection. *See Sandoval*, 231 U.S. at 33-41; *Martine*, 442 F.2d at 1023-24. The language of § 1151(b) requires no federal set aside of land, and such a requirement may not properly be added by judicial fiat. *See generally Pinter v. Dahl*, 486 U.S. 622, 653 (1988) (" 'The ultimate question is one of congressional intent, not one of whether this Court thinks it can improve upon the statutory scheme that Congress enacted into law.' ") (quoting *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979)).

Second, land set aside by Congress for Indian people is Indian country under § 1151(a). *John*, 437 U.S. at 649

(Lands were "declared by Congress to be held in trust by the Federal Government for the benefit of the Mississippi Choctaw Indians . . . . There is no apparent reason why these lands . . . did not become a 'reservation'. . . . "); *Potawatomi*, 498 U.S. at 511 ("As in *John*, we find that this trust land is 'validly set apart' and *thus* qualifies as a reservation. . . . ") (emphasis added); *McGowan*, 302 U.S. at 537-39 ("land owned by the United States and purchased out of funds appropriated by Congress" for the Reno Indian Colony is the equivalent of a "reservation"). Imposing a federal set aside of land as a prerequisite to the existence of Indian country under 18 U.S.C. § 1151(b) would render that subsection superfluous, because, in order to qualify as a dependent Indian community under that standard, the land at issue would necessarily be Indian country under § 1151(a).[5] However, statutes should not be construed so as to render any one part redundant or superfluous. *United States v. Alaska*, 117 S.Ct. 1888, 1918 (1997).

Third, "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985). The phrase "dependent Indian community" is "inherently ambiguous" and must be construed in favor

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[5] This is not to say that land that otherwise might be a "reservation" under § 1151(a) could not also qualify as a "dependent Indian community" under § 1151(b). *See, e.g., United States v. Azure*, 801 F.2d 336, 339 (8th Cir. 1986); *United States v. Castillo*, No. CR 91-489-JP, 19 Ind. L. Rep. 3096 n.1 (D.N.M. 1992). Indeed, the trust land in *United States v. South Dakota*, 665 F.2d 837 (8th Cir. 1981), *cert. denied*, 459 U.S. 823 (1982), discussed *infra* part II.A, qualifies as an "informal reservation" under § 1151(a), *John* and *Potawatomi*.

of the Indians. *Schaghticoke Indians v. Potter*, 587 A.2d 139, 144 (Conn. 1991); *State v. Ortiz*, 731 P.2d 1352, 1355 (N.M. Ct. App. 1986) (analyzing the structure of § 1151, stating that ambiguities in federal legislation concerning Indian country "should be resolved in favor of limiting state jurisdiction" and holding that all land within the limits of the San Juan Pueblo is Indian country). This rule of statutory construction has real constitutional and institutional significance. *See* Richard B. Collins, *Indian Consent to American Government*, 31 Ariz. L. Rev. 365, 374 (1989); Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 391, 418 n.158 (1993). Engrafting an inflexible federal land set aside or ownership requirement on § 1151(b) would violate this "eminently sound and vital canon" of statutory construction. *See Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655 n.7 (1976).

Fourth, Congress adopted the settled judicial construction of § 1151(b) – one that does not include a federal land set aside requirement – in its use of the phrase "dependent Indian community" in statutes passed from 1982 to 1994. Cases have arisen under 18 U.S.C. § 1151(b) in all areas of the country. It is virtually inconceivable that members of Congress could have been unaware of these conflicts and the decisions that resolved them. The courts have agreed fundamentally on the factors to be considered in analyzing such cases. *See infra* part II.A. In at least six instances since the leading cases of *Martine* and *United States v. South Dakota*, 665 F.2d 837 (8th Cir. 1981), *cert. denied*, 459 U.S. 823 (1982), were decided, Congress has employed the phrase "dependent Indian communities" to demarcate areas to be regulated by the

United States and the Indian tribes from areas under state authority.[6]

Where, as here, Congress adopts new laws incorporating the language of a prior law, Congress is presumed to have had knowledge of and adopted the settled interpretation of the incorporated language. *E.g., Field v. Mans*, 116 S.Ct. 437, 443 (1995); *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978). In addition, by enumerating additional Indian country crimes within exclusive federal jurisdiction under 18 U.S.C. § 1153,[7] Congress has demonstrated its desire to expand federal prosecution of crimes in Indian country, including within the judicially-interpreted limits of dependent Indian communities. *See, e.g., United States v. Levesque*, 681 F.2d 75, 76-78 (1st Cir.) (finding jurisdiction for conviction under § 1153 where

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[6] *See* 42 U.S.C. § 10101(19)(A) (Nuclear Waste Policy Act of 1982 defines Indian "reservation" to include any dependent Indian community); 25 U.S.C. § 3001(15)(B) (Native American Graves Protection and Repatriation Act of 1990 defines "tribal land" to include "all dependent Indian communities"); 25 U.S.C. § 3501(2) (Energy Policy Act of 1992 defines the term "Indian reservation" to include "Indian reservations; public domain Indian allotments; . . . and dependent Indian communities . . . . "); 16 U.S.C. § 470w(14)(B) (1992) Amendments to the National Historic Preservation Act define "tribal lands" to include all dependent Indian communities); 16 U.S.C. § 1722(6)(E) (Public Land Corps Act of 1993 defines "Indian Lands" to include "any land held by dependent Indian communities"); 25 U.S.C. § 3902(3)(B) (Indian Lands Open Dump Cleanup Act of 1994 defines "Indian land" to include dependent Indian communities).

[7] *See* 18 U.S.C.A. § 1153, Hist. & Rev. Notes (West 1984 & Supp. 1997) (concerning eight substantive amendments since 1948).

crime occurred within dependent Indian community), *cert. denied*, 459 U.S. 1089 (1982); *Martine*, 442 F.2d at 1023-24 (same).

In sum, no single " 'talismanic standard,' " such as a federal set aside of land, should control the application of § 1151(b). *Blatchford v. Sullivan*, 904 F.2d 542, 546 (10th Cir. 1990) (quoting *United States v. Mound*, 477 F.Supp. 156, 160 (D.S.D. 1979)), *cert. denied*, 498 U.S. 1035 (1991). Judicial imposition of a wooden "set aside" or federal land ownership requirement would contravene Congress' intent to codify *Sandoval* in § 1151(b). Such a requirement would violate fundamental rules of statutory construction and would contradict this Court's own pronouncements that Congress intended to define Indian country "broadly." *Sac and Fox*, 508 U.S. at 123; *see also John*, 437 U.S. at 649 n.18 (describing 18 U.S.C. § 1151 as a more "expansive" definition of Indian country); *accord Tooisgah v. United States*, 186 F.2d 93, 99 (10th Cir. 1950) (Indian country, as defined in 18 U.S.C. § 1151, has a "broad and flexible definition."); *United States v. Burnett*, 777 F.2d 593, 596 (10th Cir. 1985) (same) (quoting *Tooisgah*), *cert. denied*, 476 U.S. 1106 (1986).

II. THE COURTS OF APPEAL HAVE DEVELOPED A PROPER TEST FOR DETERMINING DEPENDENT INDIAN COMMUNITY STATUS UNDER 18 U.S.C. § 1151(b).

A. The Federal Courts of Appeal Have Developed a Single Test for Dependent Indian Community Status that is Consistent with *Sandoval*.

In the 84 years since *Sandoval* and the 49 years since Congress codified that decision in 18 U.S.C. § 1151(b), the lower federal courts have construed the phrase "dependent Indian community" in numerous decisions. A single test adopted explicitly by the First, Eighth, Ninth and Tenth Circuits, and implicitly by the Second, has emerged. Not surprisingly, the analysis adopted by the lower courts mirrors this Court's multi-factor analysis in *Sandoval*.

The first case construing 18 U.S.C. § 1151(b) is *United States v. Martine*, 442 F.2d 1022 (10th Cir. 1971). In an opinion written by Circuit Judge Seth, the court of appeals affirmed the trial court's conclusion that the Ramah Navajo area is a dependent Indian community. The court of appeals derived from *Sandoval* three factors for evaluating the Ramah community: "the nature of the area in question, the relationship of the inhabitants of the area to Indian tribes and to the federal government, and the established practice of government agencies toward the area." *Id.* at 1023. The *Martine* analysis is consistent with *Sandoval*, *see supra* part I.B., and its holding that the Ramah Navajo area is Indian country is clearly correct, *see Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832, 834 (1982). The three *Martine* factors form the core of the modern dependent Indian community inquiry.

Martine noted that "other relevant factors" may also be considered, without specifying them. *Id.* at 1024. The Eighth Circuit set forth other factors first, in *Weddell v. Meierhenry*, 636 F.2d 211 (8th Cir. 1980), *cert. denied*, 451 U.S. 941 (1981), and *United States v. State of South Dakota*, 665 F.2d 837 (8th Cir. 1981), *cert. denied*, 459 U.S. 823 (1982).

The test adopted in *South Dakota* is the one now employed by all the other federal courts of appeal that have addressed the matter.

> In *Weddell* we concluded that whether a particular geographical area is a dependent Indian community depends on a consideration of several factors. These include: (1) whether the United States has retained title to the lands which it permits the Indians to occupy and authority to enact regulations and protective laws respecting this territory; (2) the nature of the area in question, the relationship of the inhabitants of the area to Indian tribes and to the federal government, and the established practice of government agencies toward the area; (3) whether there is an element of cohesiveness . . . manifested either by economic pursuits in the area, common interests, or needs of the inhabitants as supplied by that locality; and (4) whether such lands have been set apart for the use, occupancy and protection of dependent Indian peoples[.]

South Dakota, 665 F.2d at 839 (internal quotations and citations omitted). The second South Dakota factor subsumes the three *Martine* factors. *Id.* The *South Dakota* analysis finds ample precedent in *Sandoval*. *See supra* part I.B. In sum, *South Dakota* recognizes that the dependent

Indian community inquiry " 'must be a flexible one, not tied to any single technical standard.' " 665 F.2d at 842 (citing *United States v. Mound*, 477 F.Supp. 156, 160 (D.S.D. 1979)).

Taken merely as "other relevant factors" to be considered, as contemplated both by *Martine* and by *South Dakota* itself, these other *South Dakota* factors properly reflect the common historical development of what became the three categories of Indian country.[8] However, when any of these other factors are transmuted to rigid prerequisites, their application becomes artificial and strained. Indeed, the final *South Dakota* factor, "whether such lands have been set apart for the use, occupancy and protection of dependent Indian peoples," 665 F.2d at 839, is practically the same as the ultimate standard for Indian country status under § 1151(a). *John*, 437 U.S. at 648-49 ("principal test" applied in *McGowan* is "whether the land had been validly set apart for the use of the Indians as such, under the superintendence of the Government") (quoting *United States v. Pelican*, 232 U.S. 442, 449 (1914)). Were proof of this "other factor" *required* to satisfy

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[8] The common law development of the term "Indian country" by this Court is summarized in *John*, 437 U.S. at 648-49 & n.18. *McGowan*, the seminal § 1151(a) case, was based on *Pelican* and *Ramsey*, the allotment cases presaging § 1151(c), and on *Sandoval*, the dependent Indian community case codified in § 1151(b). *McGowan*, 302 U.S. at 538-39 & nn.9-11. But surely it is a mistake in logic to assert that if the result in *McGowan* was informed by language recognizing dependent Indian communities in *Sandoval* then the facts of *McGowan* must be duplicated in order for a dependent Indian community to exist. *Cf.* Ruggero J. Aldisert, *Logic for Lawyers: A Guide to Clear Thinking* 203 (3d Ed. 1997) (discussing the *non sequitur*).

§ 1151(b), as Alaska urges, the other factors would become wholly superfluous, because the land would necessarily qualify as § 1151(a) Indian country under *John* and *Potawatomi*.

All other federal courts of appeal that have addressed this issue have adopted the *South Dakota* analysis. The Tenth Circuit implicitly adopted the Eighth Circuit's elaboration of *Martine* in *Blatchford v. Sullivan*, 904 F.2d 542, 546-49 (1990), *cert. denied*, 498 U.S. 1035 (1991), and "explicitly adopt[ed]" the *South Dakota* test in *Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531, 1545 (10th Cir. 1995). The First Circuit in *United States v. Levesque*, 681 F.2d 75, 77-78 (1st Cir.), *cert. denied*, 459 U.S. 1089 (1982), relied on *Martine*, and observed that *South Dakota* followed much the same approach. Later, that court followed the Tenth Circuit in expressly adopting the *South Dakota* factors. *Narragansett Indian Tribe v. Narragansett Elec. Co.*, 89 F.3d 908, 917 (1st Cir. 1996). In turn, the Second Circuit has expressly applied the *Martine* factors, but in fact has considered other *South Dakota* factors. *United States v. Cook*, 922 F.2d 1026, 1031 (2d Cir.) (considering land title and demographics, as well as the three *Martine* factors), *cert. denied*, 500 U.S. 941 (1991).

Finally, in the Ninth Circuit's first decision in the instant case, it noted both the three-part *Martine* analysis and the more detailed *South Dakota* analysis that incorporated the *Martine* factors. *State of Alaska v. Native Village of Venetie*, 856 F.2d 1384, 1389 (9th Cir. 1988). In the decision below, the Ninth Circuit adhered to its acceptance of the

four *South Dakota* factors, with one substantive modification. *State of Alaska, ex rel. Yukon Flats School Dist. v. Native Village of Venetie Tribal Government*, 101 F.3d 1286, 1294 (9th Cir. 1996).[9] That modification elevated a federal set aside of land from a factor to be considered under § 1151(b) to a "prerequisite" for the existence of a dependent Indian community. *Id.* at 1293. As explained above, however, and as the decision below virtually concedes, this break with the other circuits conflicts with *Sandoval*, where there was no federal set aside of land, and with the categorization of informal reservations under § 1151(a), as in *John* and *Potawatomi*, rather than under § 1151(b). *Id.* at 1292-93. *See Sandoval*, 231 U.S. at 48; *Martine*, 442 F.2d at 1023; *Narragansett*, 89 F.3d at 918-19. Thus, but for the error below in elevating a federal land set aside from a factor to a prerequisite, all five circuits that have addressed this issue have reached a unified analysis that is faithful to *Sandoval*.

B. The Lower Courts' Test for Dependent Indian Community Status is Manageable and Predictable.

The principled and common-sense application of the *Sandoval* factors by the lower courts since *Martine* should dispose of the concern of amici California, *et al.*, that

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[9] The Ninth Circuit used the same factors that the Eighth Circuit set forth in *South Dakota*, but split out the second *South Dakota* factor into its three component parts from *Martine* and re-ordered them. Hence, the Ninth Circuit refers to its six-factor analysis, but that analysis is "virtually identical" to *South Dakota*'s four-factor test. *State of Alaska, ex rel. Yukon Flats School Dist. v. Native Village of Venetie Tribal Government*, 101 F.3d 1286, 1294 (9th Cir. 1996).

continued adherence to those factors will result in a chaotic proliferation of dependent Indian communities. The courts have faithfully followed *Sandoval*'s admonition that only "distinctly Indian communities" may qualify as dependent Indian communities. *See Sandoval*, 231 U.S. at 46. For example, in *Martine*, the defendant urged that if the Ramah Navajo community were held to be a dependent Indian community, such a holding would "impl[y] that wherever a group of Indians is found, e.g., in Los Angeles, there is a dependent Indian community." *Martine*, 442 F.2d at 1024. The court rejected that interpretation of § 1151(b), saying "[t]his does not follow. . . . The mere presence of a group of Indians in a particular area would undoubtedly not suffice." *Id.*

Blatchford relied on *Martine*'s admonition in rejecting the proposition that a cluster of primarily Indian dwellings at a highway intersection is a dependent Indian community, because "the primary purpose of the community is not federal protection of dependent Indians but private commercial activity." *Blatchford*, 904 F.2d at 549. Similarly, the Eighth Circuit refused to "expand the definition of a dependent Indian community under section 1151 to include a locale merely because a small segment of the population consists of Indians receiving various forms of federal assistance." *Weddell*, 636 F.2d at 213. *Watchman* considered the functional definition of community as "a mini-society consisting of personal residences and an infrastructure" in determining what could be a dependent Indian community, 52 F.3d at 1543-45, and *Narragansett* found that a federally supported tribal housing project was not a dependent Indian community because it was not sufficiently dependent, 89 F.3d at

921-22. The uniform analysis formulated by the lower courts based on *Sandoval* has proved to be entirely manageable and reasonably predictable.

III. FEDERAL RECOGNITION IS SUFFICIENT EVIDENCE OF THE DEPENDENT STATUS OF AN INDIAN TRIBE.

Amici Navajo Nation, *et al.*, feel compelled to address the demeaning notion of the "dependent" component of the phrase "dependent Indian community" advanced by Alaska and its supporters here. From the earliest Indian law decisions of this Court to the present, the concept of "dependency" has been fundamentally a political dependency, not a physical or economic dependency. In this era of government-to-government respect between the federal and tribal governments, federal recognition of a tribe is sufficient evidence of that dependent relationship.

Congress now requires the Secretary of the Interior to publish annually a list of all federally recognized Indian tribes "eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 479a-1. Congress prohibits the Secretary from removing any tribe from the list, as this would be tantamount to termination. *See* 25 U.S.C. § 1212(3).

In *Cherokee Nation v. Georgia*, 5 Pet. (30 U.S.) 1 (1831), the Court examined the status of the Indian tribes, and introduced the concept of dependency. "They may, . . . perhaps, be denominated domestic dependent nations. . . . [T]hey are in a state of pupilage. Their

relation to the United States resembles that of a ward to his guardian." *Id.* at 17.

Worcester v. Georgia, 6 Pet. (31 U.S.) 515 (1832), underscores the political foundation of tribal "dependency." The Court observed that "the settled doctrine of the law of nations is that a weaker power does not surrender its independence – its right to self-government, by associating with a stronger and taking its protection." *Id.* at 560-61. Finding that the Cherokee Nation was "a distinct community, occupying its own territory, with boundaries accurately described," *id.* at 561, the Court held that Georgia law purporting to govern conduct within Cherokee territory was void, because relations with the Indian nations "are committed exclusively to the government of the Union." *Id.*

In upholding congressional authority to enact criminal laws applicable in Indian country, the Court in *United States v. Kagama*, 118 U.S. 375 (1886), expounded on the concept of dependency as follows:

> These Indian Tribes *are* the wards of the Nation. They are communities *dependent* on the United States; dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.

Id. at 383-84 (emphasis in original); *accord Jones v. Meehan*, 175 U.S. 1, 10 (1899) (quoting *Cherokee Nation*, 5 Pet. (30 U.S.) at 17).

Sandoval itself adverted to the predominantly political nature of dependency. There, the Court observed that the Pueblo Indians "have been regarded and treated by the United States as requiring special consideration and protection, like other Indian communities." The opinion lists several examples of this protection, which focus not on blankets and hand-outs, but on acts of Congress that prohibited taxation of Pueblo lands and that funded resident Indian agents and attorneys, and the provision of schools, dams, additional lands and farm implements. These federal actions, designed to protect the Pueblo people from the avarice of others and to lead to self-sufficiency of the Pueblos, were the predicate of the Court's observations that the Pueblos were "dependent upon the fostering care and protection of the government." *Sandoval*, 231 U.S. at 41; *accord United States v. Chavez*, 290 U.S. 357, 362-63 (1933).

"[I]n respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts." *Sandoval*, 231 U.S. at 46. By a clear statement of its intent to do so, Congress alone may exercise the power to end the dependent relationship. *Re Heff*, 197 U.S. 488, 499 (1905), *overruled in part on other grounds, United States v. Nice*, 241 U.S. 591 (1916).

The assimilationist policies of the late 1800s and early 1900s were replaced by those promoting tribal self-government and self-sufficiency. In 1934, Congress passed the Indian Reorganization Act " 'to give [the Indian] a chance to develop the initiative destroyed by a century of oppression and paternalism.' " *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (quoting H.R. Rep. No. 1804, 73d Cong., 2d Sess., at 6 (1934)). The overriding goal of federal policy is now "tribal self-sufficiency and economic development." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216-17 (1987); *see, e.g.*, 25 U.S.C. § 450, *et seq.*

Federal policy in the 1990s springs from President Nixon's "self-determination without termination" policy. Special Message to the Congress on Indian Affairs, 1970 Pub. Papers 564, 565. The Reagan administration "underscore[d] its commitment to recognizing tribal governments on a government-to-government basis" while committing to fulfill the federal trust responsibility "in accordance with the highest standards." President's Statement on Indian Policy, 19 Weekly Comp. Pres. Doc. 98, 99-100 (1983). The government-to-government relationship was described as the "cornerstone of the Bush-Quayle administration's policy of fostering tribal self-government and self-determination." President's Statement Reaffirming the Government-to-Government Relationship Between the Federal Government and Indian Tribal Governments, 27 Weekly Comp. Pres. Doc. 783 (1991). President Clinton reaffirmed that policy by instituting guidelines to "ensure that the federal Government operates within a government-to-government relationship with federally recognized Native American tribes."

Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22,951 (1994).

In this context, Alaska's view that "dependency" means Indians lining up for rations at the fort is untenable. In *Sandoval*, as now, tribal dependency is predominantly a *political* dependency. That political relationship is an "ongoing" one. *Bryan v. Itasca County*, 426 U.S. 373, 388 n.14 (1976) (quotation and citation omitted). "The needs of Indian people must necessarily change with the years, and the method of supervision over them by the United States must change accordingly." *United States v. Mound*, 477 F.Supp. 156, 160 (D.S.D. 1979). Tribal self-determination and self-sufficiency form the goals of current congressional policy. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987). Therefore, tribes should not be penalized for success in regaining – from the United States – "greater control over their own destinies." *Morton v. Mancari*, 417 U.S. 535, 553 (1974); 25 U.S.C. § 450(a)(1).

Conversely, because of the historic vacillations in federal policy, "[a] degree of assimilation is inevitable . . . and does not entail the abandonment of distinct Indian communities." *United States v. Washington*, 641 F.2d 1368, 1373 (9th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982). Thus, the provision of services by a state or its subdivision to an area traditionally occupied and governed by Indians should not defeat Indian country status. *See Donnelly v. United States*, 228 U.S. 243, 267 (1913) (creation and operation of school district by state did not defeat "Indian country" status of Indian reservation); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164,

172-73 & n.12 (1973); *John*, 437 U.S. at 652 & n.23; *Levesque*, 681 F.2d at 78 (assertion of state criminal jurisdiction for nearly 200 years over Passamaquoddy Indians did not defeat finding of dependent Indian community after federal recognition in 1979); *South Dakota*, 665 F.2d at 840-42; *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 379 (1st Cir. 1975) ("Voluntary assistance rendered by a state to a tribe is not necessarily inconsistent with federal protection."); *Shepherd v. Platt*, 865 P.2d 107, 110 (Ariz. Ct. App. 1993) (Tribal people in Indian country "are entitled to the same [county] benefits as non-Indian residents.").

"Dependency" is primarily a political dependency in an era where federal policy encourages tribal self-government and self-sufficiency in the context of government-to-government respect. Federal recognition of a tribe is sufficient evidence of that government-to-government relationship and the commitment of the United States to protect tribal autonomy and well-being. *See McClanahan*, 411 U.S. at 168-69; *The Kansas Indians*, 5 Wall. (72 U.S.) 737, 755 (1867). Federal recognition of a self governing Indian community is conclusive of its "dependent" status.

CONCLUSION

Sandoval found that each of the twenty Pueblo Indian tribes were "dependent Indian communities" which occupied Indian country, even though there was no federal set aside of land for fourteen of them. In 1948, Congress codified *Sandoval* in 18 U.S.C. § 1151(b), and did not then

or at any time thereafter impose a federal land set aside or ownership requirement.

The federal courts of appeal have construed § 1151(b) in a consistent and common-sense manner. The test agreed on by the federal courts of appeal is true to *Sandoval*'s own multi-factor analysis. Respondent satisfied the Ninth Circuit's version of that test, even though the Ninth Circuit incorrectly elevated a federal set aside of land to a "prerequisite" for a dependent Indian community, rather than simply one factor to be considered.

Congress employed the phrase "dependent Indian community" in at least six statutes passed from 1982 to 1994. Congress should be presumed to have adopted the consistent judicial interpretation of § 1151(b) anchored in *Martine* and *South Dakota*. Therefore, unless ANCSA constitutes a clear statement by Congress of its intent to end the special relationship of Venetie with the federal government, this Court should apply the *Sandoval* factors as developed in *Martine* and *South Dakota*, and affirm.

Respectfully submitted,

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